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DECISION THE COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-214081.3 **DATE:** April 4, 1985

MATTER OF: Wheeler Brothers, Inc.; Defense Logistics Agency--Request for Reconsideration

DIGEST:

1. GAO affirms a prior decision which held that an award to an offeror who did not propose to place a "computer on site" as specifically required by the request for proposals was improper, since it has not been shown upon reconsideration that GAO erred in concluding that the solicitation provision mandated the actual physical installation of the contractor's mainframe computer, rather than only peripheral equipment, at the government facility.

2. When a solicitation provision is held to be, at best, susceptible of more than one reasonable interpretation, and thus ambiguous, the protester need not establish that it definitely would have been the successful offeror absent the solicitation defect, but rather that there was a reasonable possibility that the protester was displaced due to the unfair competitive advantage afforded another offeror as a result of the defect. Where the difference between two offers is little more than 3 percent of the estimated value of the contract, the difference is slight enough to uphold a finding that the protester reasonably might have been the low offeror but for the unequal competition created by the ambiguity.

Wheeler Brothers, Inc. and the Defense Logistics Agency (DLA) request reconsideration of our decision, McCotter Motors, Inc., B-214081.2, Nov. 19, 1984, 64-2 CPD ¶ 539, in which we sustained a protest by McCotter Motors

under request for proposals (RFP) No. DLA700-84-R-0620 alleging that DLA had improperly awarded a contract to Wheeler, the low offeror, for a contractor-operated parts depot (COPAD) at the Defense Depot, Mechanicsburg, Pennsylvania. We affirm the original decision.

Our decision held that Wheeler's offer had not complied with an RFP provision requiring the contractor to have a "computer on site" at the Mechanicsburg facility to perform the work, which entailed the receipt and processing of parts orders electronically transmitted by the government to the contractor through the use of automatic data processing (ADP) equipment. Alternatively, we held that even if Wheeler's offer were found to be in compliance, the solicitation provision was, at best, ambiguous as written and caused offerors to compete on an unequal basis. Therefore, we recommended that DLA refrain from exercising any options under Wheeler's contract at the end of the initial term of performance, and resolict the requirement.

Central to this matter has been the precise meaning of the following special provision (SP-6) of the RFP:

> "a. In addition to the capability to manually process orders. . . the Contractor will have a computer on site with the capability for telecommunications support with BISYNC batch communication.
>
> (1) The interface will be established during the Phase-In Period. . . . This interface will have the following capabilities:
>
> (a) Receive orders in electronic format and to print the order. . . at the Government furnished facility. . . .
>
> (b) The capability to provide the CAO [Contract Administration Office] in electronic format the acceptance of orders. . . .

> (c) The capability to provide invoices in electronic format to the CAO and the Office of the Comptroller at DCSC. . . ."

McCotter's protest asserted that clause SP-6 was subject to only one interpretation--that the contractor was required to install all of its computer equipment at the COPAD facility. Thus, McCotter argued that the award to Wheeler was improper because Wheeler had not placed its mainframe computer, or central processing unit (CPU), at Mechanicsburg, but had retained it at its home office located some 125 miles distant. Wheeler had placed peripheral devices--a communications controller and terminals and printers--at the COPAD facility, which were linked to its home office CPU by a telecommunications line, but McCotter maintained that Wheeler's offered system as configured did not comply with the requirement of SP-6 for a "computer on site," that is, for a complete computer system to be physically located at the COPAD facility.

We concluded that McCotter's assertion was correct, and that SP-6 indeed mandated a specific physical configuration of equipment, and did not represent merely a functional or performance capability requirement. In our view, the term "computer on site" was to be given its literal meaning as requiring the installation of all of the contractor's ADP equipment at the COPAD facility.

In the request for reconsideration, the parties again assert that clause SP-6 only required that the contractor's computer system have the capability to "interface" with the government's computer system so as to be able to receive and process parts orders in a complete electronic format, and not that the contractor's CPU had to be physically installed at the COPAD facility. The parties have continued to assert that since Wheeler's system as originally configured and offered (retaining its CPU at its home office) was tested by the government and found to be fully capable of "interfacing" with the government's system, Wheeler's offer was in compliance with SP-6. In any event, the parties point out, Wheeler has now installed a CPU at the COPAD facility, in addition to retaining its original CPU at its home office, and thus argue that corrective

action in the form of not exercising the options and resoliciting the requirement at the end of the initial term of performance would be inappropriate.

Also, the parties contend that our November 19 decision was in error because we had been misled by McCotter into assuming that the firm had "interfaced" with the government under its prior contract. The parties state that the COPAD contract in issue was a significant departure from contracts that had been performed alternatively by Wheeler and McCotter at the Mechanicsburg facility for several years. Formerly, all parts orders had been manually transmitted from the government to the contractor, who would then process the orders with its various parts suppliers. Therefore, prior to the present contract, neither Wheeler nor McCotter had ever electronically "interfaced" with the government; that is, the contractor's system had never been electronically linked with the government's system. The purpose of the present acquisition was to establish such an "interface," although the contractor still had to retain the capability of manually processing orders should the computer systems become non-functional.

Under its prior contract, McCotter had purchased and installed a complete computer system at Mechanicsburg in response to DLA's intent to modify the contract to establish an electronic "interface" with McCotter during the remaining period of performance. However, DLA informs us that the modification was never issued because DLA and McCotter could not agree on a price for the modification. Also, DLA states that the system proposed by McCotter under its prior contract would not have complied with SP-6. Accordingly, Wheeler and DLA assert that since we mistakenly assumed that McCotter had previously "interfaced" with the government and had done so through an on-site computer, we improperly concluded that SP-6 required the installation of an on-site computer at Mechanicsburg, as McCotter had done under the prior contract.

DLA further argues that since SP-6 was a totally new requirement for an electronic "interface," both Wheeler and McCotter were competing on an equal basis, even though the firms chose different approaches to meet SP-6 in terms of performance capability. In this regard, DLA refers to the minutes of the pre-proposal conference, in which McCotter's vice-president stated that he did not want to perform at

any location other than at the Mechanicsburg facility. Accordingly, DLA urges from this that McCotter could not have been misled by SP-6 into retaining its CPU at the COPAD facility, since the firm had intended to do so from the outset of the procurement. DLA thus concluded that we erred as well in deciding that even if Wheeler's original offer were found to be conforming, SP-6 was ambiguous and had created an unequal competition. On this point, both Wheeler and DLA contend that even if we were correct that SP-6 was subject to more than one reasonable interpretation, McCotter has never established that it was prejudiced by the ambiguity. The parties believe that our Office unreasonably accepted McCotter's self-serving figures which purported to show that the firm would have saved a considerable amount of money in terms of personnel costs and corporate taxes (approaching the price differential between the firms' offers) if it had known that SP-6 did not require the physical location of the contractor's entire computer system at the COPAD facility.

Furthermore, aside from errors of fact, DLA asserts in the reconsideration request that our November 19 decision contains three errors of law which warrant reversal.

First, DLA urges that McCotter's original protest should have been dismissed as untimely because it alleged a solicitation impropriety with respect to SP-6, and thus McCotter was required to raise the issue no later than the date and time set for receipt of best and final offers, which was not the case.

Second, DLA contends that we legally erred because we substituted our technical judgment for DLA's regarding whether or not Wheeler's offer met the government's performance requirements stated in SP-6. DLA asserts that we improperly read SP-6 as requiring the physical installation of a mainframe or CPU at the COPAD facility, when in fact such terms do not appear in SP-6 or anywhere else in the RFP.

Third, DLA states that we ignored the agency's report, which recommended a broad interpretation of SP-6, and that we strained in our decision to find that Wheeler's offer was not in compliance with that provision.

In response to the reconsideration request, we held a conference with all of the parties in attendance. We have also accepted into the record certain technical diagrams from Wheeler which show both the computer system it originally offered, retaining its CPU at its home office, and the present system which has entailed the installation of an additional CPU at the COPAD facility.

We still think our prior conclusion that SP-6 required the installation of the contractor's CPU at the COPAD facility is correct. The term "computer" means the presence of a mainframe or CPU, without which there can be no true system "intelligence."[1]/ After an examination of Wheeler's schematic diagrams, we are of the opinion that Wheeler's original system, as offered in response to the RFP, only provided input/output devices at the COPAD facility, which lacked true system computational capability. Therefore, the firm's offer did not constitute a "computer on site." We also point out one of DLA's apparent purposes for requiring "on site" physical location--the additional requirement that the contractor be able to process orders manually should the ADP equipment malfunction--which would be degraded if the major portion of the contractor's order-processing system were located away from the COPAD facility. On the basis of our technical reexamination of the record, we affirm our original conclusion that SP-6 mandated the physical location of the contractor's CPU at Mechanicsburg, and therefore that Wheeler's original offer was nonconforming.

It is irrelevant that Wheeler has now installed a CPU at the COPAD facility. As we emphasized in our November 19 decision, the basis for an award must be the same, in material terms, as that on which the competition is conducted, under the fundamental principle of federal procurement that offerors be treated equally and be provided a common basis for proposal preparation. Host International, Inc., B-187529, May 17, 1977, 77-1 CPD ¶ 346. Therefore, because Wheeler's original offer did not conform to SP-6, which in our view clearly represented a material requirement of the RFP, it should have been considered unacceptable. See Computer Machinery Corp., 55 Comp. Gen. 1151 (1976), 76-1 CPD ¶ 358.

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[1]/See Microprocesser Lexicon, SYBEX, 1978, which defines a computer as a: "General purpose computing system incorporating a CPU . . . ."

In any event, we note that Wheeler's schematic diagrams seem to show that this newly-installed CPU merely relays data from the government's CPU to Wheeler's original CPU which remains at its home office. Wheeler states that it installed its additional CPU at Mechanicsburg to demonstrate that the particular physical location of the CPU had no impact upon system capability, and also to point out that the costs involved in doing so (approximately $22,000) were relatively insignificant. If this is so, then Wheeler admittedly still does not have an on site computer as claimed by the parties.

We also believe that Wheeler and DLA have misread our prior decision in concluding that we were under the false impression that McCotter had electronically "interfaced" with the government under its prior contract. We had stated that McCotter had "electronically processed orders during the entire 3-year term of its prior contract . . . .," but we only intended that statement to mean that McCotter had had the capability to process orders between itself and its suppliers in an electronic format, and not to mean that McCotter had been able to "interface" with the government.

Significantly, our point was that McCotter had already installed a CPU at the Mechanicsburg facility, and therefore that it was reasonable for the firm to interpret SP-6 as requiring such an installation. Although DLA argues that the minutes of the pre-proposal conference show that McCotter never intended to install its CPU anywhere other than at the COPAD facility, and thus that it was not induced by SP-6 into submitting an offer beyond that which was required to meet the government's needs, the argument has no bearing upon the issue of ambiguity. As we stated in our November 19 decision, even if we were to conclude that Wheeler's original offer should be regarded as conforming under a broad interpretation of SP-6, it was equally plausible that McCotter had acted reasonably in interpreting SP-6 on the basis that it did.

An ambiguity exists where two or more reasonable interpretations of a specification are possible. EMS Development Corp., B-207786, June 28, 1982, 82-1 CPD ¶ 631. A firm's particular interpretation need not be the most reasonable one to have a finding of ambiguity. Wright Associates, Inc., ASBCA No. 22492, Sept. 7, 1979, 79-2 BCA ¶ 14,102. Rather, a firm is only required to show that its

interpretation of the language in issue is reasonable and susceptible of the understanding it reached. Bennett v. United States, 371 F.2d 859 (Ct. Cl. 1967). With all of the controversy that has been generated as to the precise meaning of SP-6,[2]/ we believe that the provision was, at best, ambiguous as drafted, even though DLA and Wheeler do not necessarily agree with our conclusion that SP-6 mandated a physical configuration of equipment. In essence, we believe that it is unreasonable for them to assert that SP-6 is only susceptible to the broad interpretation that they give it, and that McCotter acted unreasonably in interpreting it otherwise. Accordingly, we also affirm our prior conclusion that SP-6 was an ambiguous provision which adversely affected the competition.

The only remaining factual issue of relevance, as we see it, is Wheeler's and DLA's assertion that McCotter has not demonstrated that it was prejudiced by the ambiguity. The parties do not accept McCotter's figures which purport to show that the firm would have saved a considerable amount of money, approximately the difference between the two offers, if it had known that it could have placed its CPU at its home office rather than at the COPAD facility. The bulk of these savings are represented by reduced personnel costs, since McCotter asserted that it could have eliminated 23 positions if its CPU were not placed at Mechanicsburg. The other savings are represented by the lower corporate income taxes and unemployment taxes that McCotter urged would ensue if the major portion of the work were performed in Florida, the situs of its corporate headquarters, rather than in Pennsylvania.

Wheeler strenuously argues that McCotter's figures are wholly self-serving. The firm contends that it is simply spurious for McCotter to contend that it would have eliminated 23 positions (McCotter identified the employees

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[2]/We note, as we indicated in our prior decision, that the contracting officer herself originally concluded that SP-6 required the location of "the complete electronic interface system" at Mechanicsburg, and that Wheeler's original offer "did not literally comply" with the requirement. She has since changed her mind.

by name and job title) by moving the CPU to Florida, as Wheeler states that the major portion of its own workforce, in performing the present contract, is located at the COPAD facility, rather than at its home office. Further, Wheeler points out that the great majority of the job titles that McCotter itself provided for these 23 positions seemingly have little or no relation to data-processing functions. Wheeler also disputes McCotter's assertion with respect to corporate income tax savings, as Wheeler states that since the contractor must deliver the parts to the Mechanicsburg facility where the parts are sold to the government, the contractor is subject to both Pennsylvania corporate income tax and franchise tax. Wheeler further urges that any savings in unemployment taxes is doubtful, since any difference is simply due to the number of McCotter employees in Pennsylvania versus those in Florida. Wheeler states that, regardless of whether McCotter's employees are in Pennsylvania or Florida, the standard unemployment tax rate is the same. Wheeler also argues that McCotter's total costs would in fact have increased by moving its CPU to Florida because of additional equipment, telecommunications, and maintenance costs. Therefore, Wheeler maintains that since we relied upon McCotter's false or incorrect figures to conclude that McCotter was prejudiced by SP-6's ambiguity, our prior decision should be reversed for that reason.

However, as we pointed out in our decision, the standard of review as to a showing of prejudice is not that the protester must establish that it definitely would have been the successful offeror absent the solicitation defect, but rather that there was a reasonable possibility that the protester was displaced due to the unfair competitive advantage afforded another offeror as a result of the defect. See Downtown Copy Center, 62 Comp. Gen. 65 (1982), 82-2 CPD ¶ 503. Here, as we had no doubt but that SP-6 was, at best, an ambiguous solicitation provision, we concluded that this defect resulted in an unequal competition. See Contact International, Inc.--Request for Reconsideration, B-210082.2, Sept. 2, 1983, 83-2 CPD ¶ 294. Hence, the burden was upon McCotter only to show that there was a reasonable possibility that it was displaced by that defect, id., and we are still of the opinion that McCotter met that burden by setting forth its own analysis of the potential effect of having located the CPU at its home office. Otherwise, we would have to conclude that McCotter

has submitted knowingly false or inaccurate personnel and taxation cost figures to this Office, and despite Wheeler's implication to that effect, there is simply nothing in the record to suggest that McCotter has in fact done so. In any event, the difference between the two offers is a little more than 3 percent of the estimated value of the contract, and, although that difference is not wholly related to ADP costs, we think it is slight enough to uphold a finding that McCotter reasonably might have been the low offeror but for the competitive inequality created by SP-6.

We need not address at length the arguments DLA raises as to the alleged errors of law that exist in our November 19 decision.

There is no merit to DLA's continued assertion that the protest was untimely and should have been dismissed. We acknowledge that a firm's reasonable interpretation of an ambiguous provision may not provide a basis for relief if the ambiguity is patent, since a duty is imposed upon offerors to request clarification of such patent ambiguities. B.D. Click Co., Inc. v. United States, 614 F.2d 748 (Ct. Cl. 1980). However, it should be obvious that SP-6 did not entail a patent ambiguity because both sides to this controversy have repeatedly held that their interpretation is the only correct one.[3]/ Hence, any ambiguity that existed did not become apparent until McCotter learned that the award had been made to Wheeler under a different interpretation of SP-6, which McCotter maintained was wholly in error, and thus McCotter's protest to this Office, filed within 10 working days of that knowledge, was timely. 4 C.F.R. § 21.2(b)(2) (1984); see also Conrac Corp., B-205562, Apr. 5, 1982, 82-1 CPD ¶ 309. In any event, a contract award on the basis of an ambiguous specification, even if that ambiguity is patent, is nevertheless improper and necessitates corrective action. EMS Development Corp., supra.

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[3]/We again emphasize that we firmly believe that SP-6 should have been narrowly construed as a physical configuration, and not a mere performance capability, requirement. Our November 19 decision addressed the issue of ambiguity only as an alternative legal basis for our conclusion that corrective action was warranted.

Next, we do not agree that we have substituted our technical judgment for DLA's. Our general policy is to accept the technical judgments of the procuring agency's specialists unless those judgments are shown to be erroneous. See, e.g., Control Central Corp. et al., B-214466.2 et al., July 9, 1984, 84-2 CPD ¶ 28. Here, we simply concluded that DLA's judgment as to the putative sole meaning of SP-6 was shown to be erroneous. (We again note that the contracting officer for this acquisition was intially of the same view as this Office as to the meaning of that provision.)

Finally, DLA asserts that we have violated our own legal standard under which we supposedly attempt to find an offer conforming so that the government will be able to take advantage of a lower price. Upon an examination of prior decisions of this Office cited by DLA in support of its assertion, we remain unaware of any precise legal standard of review that would allow us to find Wheeler's original system conforming to SP-6, so that the government could take advantage of the firm's lower-priced offer. DLA is simply mistaken in its belief that our November 19 decision strained to find Wheeler's offer in noncompliance; rather, it was, and still is, our conclusion that Wheeler clearly had not met the requirement of SP-6 because the firm had not installed its CPU at the COPAD facility. To conclude otherwise, and to withhold a recommendation for corrective action here, would only serve to compromise the integrity of the competitive procurement system. Downtown Copy Center, supra.

Accordingly, our November 19 decision sustaining McCotter's protest and recommending corrective action is affirmed.

for Harry R. Van Cleve
Comptroller General
of the United States